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No. 97-1322

In the Supreme Court of the United States

OCTOBER TERM, 1997

SHARON HOFFMAN, ET AL., PETITIONERS

v.

JAMES B. HUNT, JR., GOVERNOR OF NORTH CAROLINA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
FRANK W. HUNGER
Assistant Attorney General
MARK B. STERN
SUSHMA SONI
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

25 pp

QUESTIONS PRESENTED

1. Whether Congress lacked authority under the Commerce Clause to enact the Freedom of Access to Clinic Entrances Act of 1994 (Access Act), 18 U.S.C. 248.

2. Whether the Access Act is an unconstitutional viewpoint-based restriction on speech.

3. Whether the Access Act is unconstitutionally overbroad or vague.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 126 F.3d 575. The opinion of the district court (Pet. App. 28a-92a) is reported at 923 F. Supp. 791.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1997. A petition for rehearing was denied on November 14, 1997 (Pet. App. 148a-152a). The petition for a writ of certiorari was filed on February 12, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. *Statutory Background*

Congress enacted the Freedom of Access to Clinic Entrances Act of 1994 (Access Act or FACE), Pub. L. No. 103-259, 108 Stat. 694, 18 U.S.C. 248, in response to a nationwide campaign of violent and obstructive interference with access to reproductive health services. S. Rep. No. 117, 103d Cong., 1st Sess. 3 (1993) (S. Rep.). From 1977 through April 1993, more than 1,000 acts of violence against providers of abortion services were reported in the United States. *Ibid.*; H.R. Rep. No. 306, 103d Cong., 1st Sess. 6 (1993) (H.R. Rep.). Those acts included at least 36 bombings, 81 arsons, 131 death threats, 84 assaults, two kidnappings, 327 clinic invasions, 71 chemical attacks, and one murder. S. Rep. 3, 6; H.R. Rep. 6-7; H.R. Conf. Rep. No. 488, 103d Cong., 2d Sess. 7 (1994) (Conf. Rep.). That violence endangered the lives of, and inflicted injuries on, physicians, clinic staff and patients, caused millions of dollars of property damage, and curtailed access to health care for many women, particularly poor women who live in rural areas. S. Rep. 5.

Groups opposed to abortion organized blockades designed to bar access to health care facilities where abortions were performed and to overwhelm local law enforcement. S. Rep. 7; H.R. Rep. 7. From 1977 through April 1993, more than 6,000 clinic blockades and related disruptions were reported in the United States. S. Rep. 7; H.R. Rep. 7. Providers of abortions also received numerous death threats. S. Rep. 10.

Violence and blockades aimed at abortion providers and facilities have occurred in at least 28 States, the District of Columbia, and dozens of cities across the

country. S. Rep. 12. Many of these activities have been organized nationwide and directed across state lines. *Id.* at 13; H.R. Rep. 9. In addition, clinics and other providers of reproductive health services are involved in interstate commerce, both directly and indirectly. S. Rep. 31. Many patients who seek abortion services travel across state lines to obtain services, and clinic employees sometimes travel across state lines to work. *Ibid.*

The declared purpose and the effect of the violent and obstructive activities have been to inhibit women's access to safe and legal abortion services. S. Rep. 11 & n.22. In some cases, the purpose was to eliminate access by intimidating physicians from performing abortions and by closing clinics. *Id.* at 11, 17. The evidence before Congress demonstrated that the campaign to eliminate abortion services through violence and obstruction was succeeding and had forced many clinics to close. *Id.* at 14, 17, 31; H.R. Rep. 8-9.

Congress found that the violent and obstructive conduct burdens interstate commerce by

> interfering with the interstate commercial activities of health care providers, including the purchase and lease of facilities and equipment, sale of goods and services, employment of personnel and generation of income, and purchase of medicine, medical supplies, surgical instruments and other supplies from other states.

Conf. Rep. 7; see also S. Rep. 14, 17, 31-32. Congress found that federal, state, and local laws in effect prior to the enactment of the Access Act were inadequate to prevent violence at abortion facilities. *Id.* at 19-21; H.R. Rep. 6, 10.

The Act provides civil and criminal penalties for anyone who:

> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services; * * * [or]
>
> * * * * *
>
> (3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services.

18 U.S.C. 248(a). The statute defines "intimidate" as "to place a person in reasonable apprehension of bodily harm to him- or herself or to another." 18 U.S.C. 248(e)(3).

The Act specified, as one of its "Rules of Construction," that "[n]othing in this section shall be construed * * * to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution." 18 U.S.C. 248(d)(1).

2. *Factual and Procedural Background*

a. Petitioners are abortion opponents who have engaged in nonviolent demonstrations outside reproductive health facilities in North Carolina where abortions are performed. Pet. App. 5a-6a. On December 6, 1993, petitioners brought suit against the State

of North Carolina and its governor, a local police department, and a local law enforcement official, challenging the constitutionality of a North Carolina statute criminalizing obstruction of access to, or egress from, health care facilities, and seeking a declaratory judgment and injunctive relief. The police department and local official were later dismissed from the case. Petitioners eventually amended their complaint to add a challenge to the constitutionality of Section 3 of the then newly enacted Access Act, 18 U.S.C. 248(a)(1). *Id.* at 6a. Petitioners alleged that Congress lacked authority to enact the Access Act under the Commerce Clause or Section 5 of the Fourteenth Amendment, and that the Act violates the First Amendment. *Ibid.* The Attorney General of the United States was notified, pursuant to 28 U.S.C. 2403(c), of the challenge to the constitutionality of a federal statute and the United States was granted leave to intervene. Pet. App. 6a-7a n.4.

The district court initially stayed consideration of the case pending the decision of the Fourth Circuit in *American Life League, Inc.* v. *Reno*, 47 F.3d 642, cert. denied, 516 U.S. 809 (1995), and then ordered additional briefing in light of this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995). Pet. App. 7a.

Following an evidentiary hearing with respect to the enforcement of the North Carolina statute, the district court permanently enjoined enforcement of the state and federal statutes. Pet. App. 7a-8a. As is relevant here, the district court invalidated the Access Act on two principal grounds.[1] First, the

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[1] The district court also held that the state statute was impermissibly vague and overbroad and had been applied to

district court held that the statute violates the Commerce Clause because it regulates protest activity, which does not substantially affect interstate commerce. See Pet. App. 55a-83a. The district court concluded (Pet. App. 56a n.5) that it was not bound by the Fourth Circuit's rejection of an identical challenge in *American Life League, Inc.* v. *Reno*, 47 F.3d 642, cert. denied, 516 U.S. 809 (1995), in light of this Court's intervening decision in *United States* v. *Lopez*. The district court reasoned that, under *Lopez*, Congress's power to regulate under the Commerce Clause extends only to commercial or economic activities, which do not include "the [petitioners'] protest activities." Pet. App. 70a-72a. The district court acknowledged that its ruling was in conflict with post-*Lopez* decisions in *Cheffer* v. *Reno*, 55 F.3d 1517 (11th Cir. 1995), and *United States* v. *Wilson*, 73 F.3d 675 (7th Cir. 1995), cert. denied, 117 S. Ct. 46, 47 (1996), which did not read *Lopez* to limit Congress's commerce power to strictly commercial activities,

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petitioners in an unconstitutional manner. Pet. App. 45a-52a. The court of appeals reversed, agreeing with respondent North Carolina that its statute is neither vague nor overbroad. *Id.* at 9a. The court held that, to the extent law enforcement officers had threatened petitioners with arrest for activities that did not violate the state statute, the state statute did not permit such an application, so that the threats of arrest were invalid because *ultra vires* and the question of the constitutionality of the state statute's application therefore need not be reached. *Id.* at 13a. The United States did not address in the courts below any of the issues relating to the state statute. Respondent North Carolina has filed a brief opposing petitioner's contention (Pet. 12-14) that the Court should review the validity of the state statute as applied. Resp. State Br. in Opp. 4-11. We therefore discuss in this brief only the issues regarding the federal statute.

and which found, in any event, that reproductive health services constitute commercial activity amenable to regulation under the commerce power. Pet. App. 72a, 77a-78a. The district court further held that, even if Congress could regulate noncommercial activities under the Commerce Clause, the impact of protest activities on interstate commerce is "trivial or merely incidental," rather than substantial. *Id.* at 76a. The district court also found the Access Act void under *Lopez* because it lacks a jurisdictional element that requires a case-by-case inquiry regarding an explicit effect on interstate commerce. *Id.* at 79a.[2]

Second, the district court held that the statute reaches speech that cannot be regulated consistent with the First Amendment. The district court found that the Fourth Circuit's decision in *American Life League*, holding that the Access Act was not unconstitutionally vague or overbroad or an impermissible viewpoint based restriction, did not resolve all of petitioners' claims. Pet. App. 86a-87a. The district court found that the Access Act violates the First Amendment because its prohibition against "intimidat[ion]," as defined by the statute, impermissibly "hinges on the subjective reaction that speech elicits from its listener," and reaches beyond the restriction of "fighting words" and allows parties to sue based on their apprehension that the speaker threatens bodily harm to himself or another, and is therefore overbroad. *Id.* at 89a-90a.

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[2] The district court also rejected the argument that Section 5 of the Fourteenth Amendment provides an independent constitutional basis for the Act on the ground that Section 5 applies only to state action. Pet. App. 83a-85a.

b. The court of appeals reversed. Pet. App. 1a-27a. As is relevant here, the court stated that its prior opinion in *American Life League* survived the ruling in *United States* v. *Lopez* because the activity regulated by the Access Act—the use of force, threat of force, or physical obstruction to intentionally injure, intimidate, or interfere with persons because they are or have been obtaining or providing reproductive health services—"while not itself economic or commercial, is closely and directly connected with an economic activity." *Id.* at 23a. The court found that congressional reports accompanying the Act indicate that "many women travel across state lines to obtain reproductive health care, that facilities providing these services retain staff in an interstate employment market and utilize supplies obtained through interstate commerce, and that some reproductive health care facilities that had been the targets of the activities regulated by FACE had been forced to discontinue the provision of services." *Id.* at 23a-24a. The court concluded that because of "[t]he real and substantial connection between the conduct regulated by FACE and the interstate commercial market in reproductive health care services," the Act is a valid exercise of congressional power, under the line of authority reaffirmed in *Lopez*, "upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Id.* at 24a (quoting *Lopez*, 514 U.S. at 561). The court noted that all the other circuits that have considered the constitutionality of the Access Act under the Commerce Clause in the wake of *Lopez*

have uniformly upheld the statute as constitutional. *Id.* at 24a-25a n.8 (citing cases).[3]

The court of appeals likewise rejected petitioners' First Amendment challenges, finding that the plain language of the Act prohibits conduct only "that by force or physical obstruction injures, interferes with, or intimidates the provider or recipient of reproductive health care or speech that amounts to a threat of force that obstructs, injures, intimidates, or interferes with the provider or recipient of reproductive health care." Pet. App. 26a. "The regulation of neither the former conduct, nor the latter speech, is violative of the First Amendment." *Ibid.* (citing, *inter alia*, *Wisconsin* v. *Mitchell*, 508 U.S. 476, 484 (1993); *R.A.V.* v. *City of St. Paul*, 505 U.S. 377 (1992)).

ARGUMENT

Petitioners contend that Congress lacked authority under the Commerce Clause to enact the Access Act (Pet. 16-22), and that the statute violates the First Amendment (Pet. 22-30). Petitioners' arguments are substantially similar to arguments raised in several petitions for writs of certiorari that the Court has previously denied: *American Life League, Inc.* v. *Reno*, 47 F.3d 642 (4th Cir.), cert. denied, 516 U.S. 809 (1995); *Woodall* v. *Reno*, 47 F.3d 656 (4th Cir.), cert. denied, 515 U.S. 1141 (1995); *United States* v. *Soderna*, 82 F.3d 1370 (7th Cir.), cert. denied, 117 S. Ct. 507 (1996); *United States* v. *Dinwiddie*, 76 F.3d

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[3] In light of that ruling, the court of appeals declined to address the United States' alternative arguments that Congress possessed authority to enact the Access Act to protect persons or things in interstate commerce under the second category of Commerce Clause powers or under Section 5 of the Fourteenth Amendment. Pet. App. 25a n.9.

913 (8th Cir.), cert. denied, 117 S. Ct. 613 (1996); *United States* v. *Wilson*, 73 F.3d 675 (7th Cir. 1995), cert. denied, 117 S. Ct. 46, 47 (1996); and *Terry* v. *Reno*, 101 F.3d 1412 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 2431 (1997). The Court should deny review in the instant case for the same reasons. The decision of the court of appeals is correct and does not merit further review.[4]

1. The decision below is wholly consistent with the Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995). Contrary to petitioner's claim (Pet. 16-22), the activities regulated by the Access Act substantially affect interstate commerce, as required by *Lopez*.

The Court in *Lopez* reaffirmed Congress's power under the Commerce Clause to regulate three broad categories of conduct. 514 U.S. at 558-559. First, Congress is empowered to regulate the use of the channels of interstate commerce. *Id.* at 558. Second, Congress is empowered to "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce." *Ibid.* Third, Congress is empowered to regulate or prohibit "activities

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[4] Petitioners acknowledge (Pet. 15 n.7) that there is no disagreement among the federal courts of appeals regarding the constitutionality of the Access Act. All the federal courts of appeals that have considered constitutional challenges to the Access Act have upheld the validity of the Act. Petitioners also acknowledge (Pet. 15 n.7) that at least half a dozen district courts have held that the Act survives constitutional scrutiny. Petitioners nonetheless contend that the overruled opinions of the district court in this case and one other case and the dissenting views of two court of appeals judges persuasively demonstrate that the Access Act is unconstitutional. Pet. 15 n.7 (citing cases). Those opinions do not create a conflict warranting review by this Court.

that substantially affect interstate commerce." *Id.* at 559.

The court of appeals correctly held that the Access Act is a valid exercise of Congress's power to regulate "activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 559.[5] Congress is empowered to regulate conduct that "substantially affects" interstate commerce when considered in the aggregate. *Wickard* v. *Filburn*, 317 U.S. 111, 127-128 (1942). "Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." *Perez* v. *United States*, 402 U.S. 146, 154 (1971) (internal quotation marks and emphasis omitted) (upholding federal law criminalizing loan sharking without regard to whether particular loan transaction affected interstate commerce); see also *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 329-330 (1991) (boycott against one ophthalmologist affects interstate commerce).

Congress had a rational basis for concluding that the violent and obstructive activities prohibited by the Access Act "substantially affect interstate commerce" by their adverse impact on clinics and other providers of reproductive health services who are involved in interstate commerce:

> Clinics and other abortion service providers clearly are involved in interstate commerce, both

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[5] The Access Act is also a proper exercise of Congress's power, under the Commerce Clause, to regulate or to protect "persons or things in interstate commerce," *Lopez*, 514 U.S. at 558, and under Section 5 of the Fourteenth Amendment. Because the court of appeals did not reach these questions (see note 3, *supra*), we do not discuss them further.

> directly and indirectly. They purchase medicine, medical supplies, surgical instruments and other necessary medical products, often from other States; they employ staff; they own and lease office space; they generate income. In short, the Committee finds that they operate within the stream of interstate commerce.

S. Rep. 31. Also, many patients who seek abortion services "engage in interstate commerce by traveling from one state to obtain services in another," "[c]linic employees sometimes travel across State lines to work as well," and "some doctors who perform abortions work in facilities in more than one State." *Ibid.*

The violent and obstructive conduct proscribed by the Access Act substantially interferes with such interstate commerce. The prohibited conduct disrupts the sale of services and goods, the employment of personnel and generation of income, the purchase and lease of facilities and equipment, and the purchase of medicine and supplies from other States. Conf. Rep. 7; S. Rep. 14, 17, 31; H.R. Rep. 8-9. Activity prohibited by the Act forced some clinics to close, caused millions of dollars in damages to others, impeded the interstate movement of people and goods, contributed to a nationwide shortage of reproductive health services, and threatened to eradicate those commercial services from the national market. S. Rep. 3, 5, 17, 31; H.R. Rep. 8. Extensive evidence that interference with abortion services is a problem of national scope further buttressed Congress's conclusion that the proscribed conduct has a substantial aggregate effect on interstate commerce. See, *e.g.*, *Katzenbach* v. *McClung*, 379 U.S. 294, 300-301 (1964) ("nationwide scope" of the problem of racial dis-

crimination supported Congress's conclusion that it substantially affected interstate commerce).

Nothing in *Lopez* calls into question the holding of the court of appeals. The Court in *Lopez* struck down the provision of the Gun Free School Zones Act, 18 U.S.C. 922(q)(1)(A), that made criminal the possession of a firearm in the vicinity of a school. The Court reasoned that the statute "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 514 U.S. at 561; *id.* at 580 (Kennedy, J., joined by O'Connor, J., concurring). The Court concluded that the possession of an otherwise lawful firearm in a school zone bears such an attenuated relationship to interstate commerce that the Court would be required to "pile inference upon inference" to conclude that the regulated conduct affects commerce. *Id.* at 564, 567. The Court also noted the absence of evidence or congressional findings demonstrating that the regulated conduct substantially affects interstate commerce. *Id.* at 562-563.

The Access Act differs markedly from the Gun Free School Zones Act. The Access Act "by its terms" directly addresses "commerce" and "economic enterprise[s]." *Lopez*, 514 U.S. at 561. It prohibits interference with commercial enterprises and with persons because they are engaging in commerce (*i.e.*, providing or obtaining the commercial service of reproductive health care). Unlike in *Lopez*, where neither the prohibited conduct (possession of a gun near schools) nor its immediate effect (potential increase in violence in schools) was commercial, here the immediate effect of the prohibited conduct is obstruction of commercial transactions. In addition, in contrast to *Lopez*, the effect of physical obstruc-

tion of reproductive health service facilities on interstate commerce is direct: it interferes with persons, things, and the provision of services in interstate commerce and threatens in the aggregate to eliminate abortion services from the national commerce. S. Rep. 3. Also, the Access Act, unlike the Gun Free School Zones Act as originally adopted, is supported by a legislative record containing abundant evidence and specific findings by Congress showing that the proscribed conduct substantially impedes interstate commerce—findings to which the courts must defer. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981).

The *Lopez* Court reaffirmed that Congress's commerce power extends to activities that *either* "arise out of *or* are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." 514 U.S. at 561 (emphasis added). Indeed, nothing in that decision questions the power of Congress to prohibit the use, as distinguished from the mere possession, of firearms in certain situations. Here, the conduct proscribed by the Act is undoubtedly "connected with a commercial transaction" because it interferes with persons who are providing or obtaining a particular commercial service (*i.e.*, reproductive health care).

2. Nor does the Access Act discriminate against abortion opponents in violation of the First and Fifth Amendments to the United States Constitution. Contrary to petitioners' claim (Pet. 22-30), the Act does not single out abortion opponents for selectively harsh treatment, nor does it constitute a viewpoint-based ban on speech.

a. The Access Act regulates conduct, not speech. The Act does not prohibit speech—including speech that strongly opposes abortion—in the immediate vicinity of facilities that provide abortions. Instead, it prohibits the use of "force," the "threat of force," and "physical obstruction" to achieve certain ends. As this Court has made clear, such conduct is outside the scope of First Amendment protection. See *Wisconsin* v. *Mitchell*, 508 U.S. 476, 484 (1993) (violence and physical assaults not protected by First Amendment); *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 773 (1994) (threats not protected by First Amendment); *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992) (same); *Cox* v. *Louisiana*, 379 U.S. 536, 555 (1965) (First Amendment does not create right to cordon off streets or entrances to a building); *Cameron* v. *Johnson*, 390 U.S. 611 (1968) (upholding statute forbidding unreasonable interference with access to buildings). Congress may proscribe such activities, even when they are designed to communicate a message, because they "produce special harms distinct from communicative impact." *Mitchell*, 508 U.S. at 484-485 (quoting *Roberts* v. *United States Jaycees*, 468 U.S. 609, 628 (1984)).

The Access Act is viewpoint neutral because it "serves purposes unrelated to the content of the expression." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). The Act is justified, not by reference to the viewpoint of any expression it may incidentally affect, but by the need to protect interstate commercial transactions, to protect women who seek to exercise their constitutional right to reproductive choice, and to maintain public safety and order. Access Act, § 2 (Purposes), 18 U.S.C. 248 note. Those interests are unrelated to any expressive content the

forbidden conduct may have. The Act permits the expression of any message, including a message of hostility to abortion.

Petitioners argue (Pet. 24-27) that the Access Act is viewpoint-based because it proscribes certain activities only when the person acts because another person is seeking to obtain or provide reproductive health services, or because a facility provides such services. See 18 U.S.C. 248(a)(1) and (3). This requirement concerns the motive of a violator, not the message that person wishes to convey. The First Amendment does not prevent a civil or criminal statutory provision from turning on such a motive. *Wisconsin* v. *Mitchell*, 508 U.S. 476 (1993).

The Access Act does not target persons because they have an anti-abortion viewpoint. The Act does not limit its protection to "abortion clinics"; rather, it prohibits interference with persons because they are providing or obtaining "services relating to pregnancy," including counseling that an anti-abortion group might give to a pregnant woman to urge her *not* to have an abortion, and medical care to assist women in carrying their pregnancies to term. 18 U.S.C. 248(e)(5). The use of force or physical obstruction to blockade a facility providing such services violates the Act to the same extent as a blockade of a facility offering abortion services. The Act targets intentional interference with any reproductive health service, regardless of the perpetrator's views about abortion. For example, a person who supports the right to abortion might have purely personal reasons for desiring to stop a particular woman from having a particular abortion; the use of force or obstruction to achieve that end would violate the Act.

b. Even if the conduct prohibited by the Access Act had sufficient expressive content to implicate the First Amendment, which it does not, the Act would easily survive scrutiny under the test set forth in *United States* v. *O'Brien*, 391 U.S. 367 (1968). The Act (1) serves substantial governmental interests, (2) restricts conduct for reasons unrelated to its expressive content, and (3) does not impinge unnecessarily on expression. See *id.* at 377.

The Act serves substantial and legitimate governmental interests, including protecting interstate commercial transactions, preventing violence, preserving public access to health care, and protecting the exercise of the right to abortion. And, as we have explained above, those interests are unrelated to any expressive content the forbidden conduct may have.

The fact that, in practice, the majority of persons who wish to engage in conduct that would violate the Access Act may be persons who desire to express a message of hostility to abortion does not undermine the constitutionality of the Act. As *O'Brien* established, if a statute neutrally proscribes conduct, the fact that people who follow a particular ideology are more likely than others to engage in that conduct, or that such people wish to use illegal activity to express a message, does not affect the validity of the prohibition. The law at issue in *O'Brien* forbade the destruction of draft cards—conduct that, at the time the law was passed, was generally engaged in only by persons intending to express a message of hostility towards the Vietnam war. The law was nonetheless held constitutional because it proscribed conduct without regard to any intended or unintended message. The Access Act similarly proscribes obstructive, threatening, and violent conduct, without regard

to the viewpoint of the violator or content of the message he or she may want to send.

The Access Act is narrowly tailored so as not to impinge unnecessarily on expression. It is carefully drawn to prohibit only unprotected conduct, not speech. Its limiting definitions of key statutory terms further ensure that it proscribes only force, threats, and blockades that interfere with access to reproductive health care. The Act does not restrict the ability of abortion opponents to communicate with their desired audience. The statute permits speech, signs, prayers, non-obstructive picketing, distribution of handbills, and other peaceful forms of expression, even in the immediate vicinity of covered facilities and regardless of the content of the speech. *American Life League*, 47 F.3d at 648.

This Court's decisions in *Madsen* v. *Women's Health Center, Inc.*, 512 U.S. 753 (1994), and *Schenck* v. *Pro-Choice Network of Western New York*, 117 S. Ct. 855 (1997), support the Access Act's constitutionality. In *Madsen*, a state court enjoined certain anti-abortion protestors who had engaged in specific protests outside a particular health clinic from, *inter alia*, engaging in essentially the same conduct that is forbidden by the Access Act—interfering with access to, ingress into, and egress from the clinic; and physically abusing, intimidating, harassing, touching, or assaulting persons entering or leaving the clinic, or harassing, intimidating or threatening any employee of the clinic. See 512 U.S. at 759-761. The Court upheld those aspects of the injunction, concluding that those restrictions were content neutral, that they were unrelated to the defendants' message, and that any effect on expression was incidental to the government's regulation of threatening conduct. *Id.*

at 762-764, 768-770, 772. Similarly, in *Schenck*, the Court upheld certain provisions in a preliminary injunction that banned demonstrating within fixed 15-foot buffer zones around clinic doorways, driveways, and driveway entrances. 117 S. Ct. at 868-869. The Court reaffirmed *Madsen*, and ruled that the fixed buffer zone limitations were valid because they were justified by significant government interests in ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services, and were appropriately tailored to serve those interests. *Id.* at 866, 868-869.

3. The Access Act is neither unconstitutionally vague nor overbroad. Petitioners challenge as vague a series of statutory terms (Pet. 27-29), but in fact each of them gives people of ordinary intelligence "a reasonable opportunity to know what is prohibited." *Schenck*, 117 S. Ct. at 870 (quoting *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972)). For example, "physical obstruction," is defined by the Act to mean

> rendering impassable ingress to or egress from a facility that provides reproductive health services * * * or rendering passage to or from such a facility * * * unreasonably difficult or hazardous.

18 U.S.C. 248(e)(4). That provision is almost identical to one the Court upheld against a vagueness challenge in *Cameron* v. *Johnson*, 390 U.S. 611 (1968). That case concerned a Mississippi law that made it a crime for

> any person, singly or in concert with others, to engage in picketing or mass demonstrations in

> such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from [specified buildings].

Id. at 612 n.1. As in *Cameron*, the statute here "clearly and precisely delineates its reach in words of common understanding." *Id.* at 616.

The Act similarly defines other statutory terms in words of common understanding: "interfere with" means "to restrict a person's freedom of movement" (18 U.S.C. 248(e)(2)), "intimidate" means "to place a person in reasonable apprehension of bodily harm to him- or herself or to another" (18 U.S.C. 248(e)(3)). In light of the statute's explicit definition of various terms and its plainly legitimate sweep, the court of appeals correctly concluded that the statute is not overly broad or vague.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
MARK B. STERN
SUSHMA SONI
Attorneys

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